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No. 79-2008

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

SANTA FE LAND IMPROVEMENT COMPANY,
a California corporation,
Petitioner,

VS.

CITY OF BERKELEY, a political subdivision of the State of California, and the STATE OF CALIFORNIA, acting by and through the STATE LANDS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the federal questions presented by petitioner were not timely raised in the state courts, and where, as to one of the asserted federal questions, it is not within the ambit of 28 United States Code section 1257(3) and there are adequate independent state grounds for the state court's decision, does this Court have jurisdiction to consider such questions on a writ of certiorari?

2. Where issues remain to be tried on remand to the state trial court that could moot the federal questions presented, should this Court render what may be an advisory opinion?

3. Where a state has granted tidelands to private parties, does this Court's decision in *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, as a matter of federal common law, govern the nature of the title conferred upon the private parties by the state's deeds?

4. Where a state supreme court has confirmed that grants by the state to private parties of lands that lie beneath navigable waters passed a title that was subject to retained rights in the people under the public trust for commerce, navigation, and fishery, and in the course of so doing has rejected language in one of its earlier cases that was in conflict with state supreme court decisions rendered both before and after it, has the state supreme court thereby taken property in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES BELOW

The proceeding below was for a writ of mandamus in the state appellate courts to review an interlocutory order of the superior court of Alameda County, which had granted a motion for partial summary adjudication made by Santa Fe Land Improvement Company and George W. Murphy, who are plaintiffs in the primary superior court action. In the writ proceeding, the City of Berkeley (hereinafter "City") and the State of California, acting by and through the State Lands Commission (hereinafter "State") were the petitioners. The respondent was the superior court of Alameda County. George W. Murphy and Santa Fe Land Improvement Company (hereinafter "Santa Fe") were the real parties in interest. Only the City, State, and Santa Fe are parties before this Court.

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On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

Respondents City of Berkeley and the State of California, acting by and through the State Lands Commission, hereby submit their joint brief in opposition to the petition for a writ of certiorari, which seeks review of the decision of the California Supreme Court in this case.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362], as modified at 26 Cal.3d 847a. The opinion of the California Court of Appeal is reported at 147 Cal.Rptr. 113.

JURISDICTION

Santa Fe seeks to invoke this Court's jurisdiction under 28 United States Code section 1257(3). For the reasons set forth below, this Court lacks jurisdiction to consider the questions raised in the petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Fourteenth Amendment to the United States Constitution and the state statutes referred to by Santa Fe, this case also involves article X, section 4 (formerly article XV, section 2) of the California Constitution. Article X, section 4 provides as follows:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Also involved, for purposes of the jurisdictional questions, is 28 United States Code section 1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . . . . .
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

A. Nature of the Proceeding Below

The instant case was commenced in 1972 in the superior court of Alameda County when Santa Fe sued the City in inverse condemnation concerning a parcel of predominantly filled land on the Berkeley shoreline, alleging that the City had unreasonably restricted development of the property by Santa Fe.

When the nature of its title was drawn into question by the City, Santa Fe brought the State into the action as a defendant by filing an amended complaint, which set forth additional causes of action in quiet title and declaratory relief. The State answered and cross-complained in quiet title and declaratory relief against Santa Fe, both as to the complaint parcel and as to additional lands along the Berkeley waterfront claimed by Santa Fe, the greatest portion of which were still covered by Bay waters. All of the property at issue was claimed by Santa Fe under deeds from the Board of Tide Land Commissioners. (See Cal. Stats. 1869-70, ch. 388, p. 541.)

Santa Fe moved the superior court for an order of partial summary judgment concerning title to the complaint parcel. On authority of *Knudson v. Kearney* (1915)

171 Cal. 250 [152 Pac. 541], the superior court determined that Santa Fe held absolute fee simple title to the property, and granted the motion.

This action by the City and State for a writ of mandamus to compel the superior court to vacate its order followed. The writ proceeding was first heard on the merits by the California Court of Appeal. That court issued an opinion distinguishing *Knudson v. Kearney* as dictum, holding that a public trust easement for commerce, navigation, and fishery existed in all of the tide and submerged land sold by the Board of Tide Land Commissioners, and directing that the writ issue. (147 Cal.Rptr. 113, 125.)

After denial of rehearing by the court of appeal, Santa Fe filed a petition for hearing with the state supreme court. The supreme court granted hearing and rendered the decision here challenged.

B. Tidelands Trust Law in California

From the early days of statehood, the California Supreme Court has recognized the special nature of the State's ownership, in trust for its people, of lands beneath navigable waters, and the special strictures and limitations upon the State's authority to administer such lands and to dispose of them to private parties. (See, e.g., *Eldridge v. Cowell* (1854) 4 Cal. 80, 87-88; *Ward v. Mulford* (1867) 32 Cal. 365, 372.) In *Ward v. Mulford, supra,* the supreme court stated:

> "[Tideland] is held by the State in trust and for the benefit of the people. The right of the State is subservient to the public rights of navigation and fishery, and theoretically, at least, the State can make

> no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned." (32 Cal. at p. 372.)

The limited character of any ownership of tidelands by private persons was confirmed by article XV, section 2 of the 1879 California Constitution (now article X, section 4), which provided that no private person "claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water . . . ."

In *People v. California Fish Co.* (1913) 166 Cal. 576 [138 Pac. 79], the supreme court rendered what is perhaps its most definitive and comprehensive treatment of the limits that the tidelands trust places upon the State in disposing of lands that it acquired by virtue of its sovereignty upon statehood. Under consideration in that case was a statutory sales program whereby approximately 80,000 acres of tideland had been sold to private parties by the State. The tideland patents purported to be dispositions of absolute fee title. In light of the trust strictures upon State disposition of such lands, the court construed the patents as conferring only a limited private title, one that was subject to a retained public trust easement in the public for trust uses. (166 Cal. at pp. 598-599.) The court did acknowledge that there were certain limited circumstances in which, where the Legislature's intent was

clear beyond question, the State might make an absolute disposition of such trust lands to private parties (166 Cal. at p. 597), but reiterated its earlier holdings that the mere delineation of a bulkhead line does not lift the trust over waters lying within that line. (166 Cal. at pp. 599-600; *People v. Kerber* (1908) 152 Cal. 731, 737, [93 Pac. 878]; *People v. Williams* (1884) 64 Cal. 498, 499 [2 Pac. 393].)

As articulated in *People v. California Fish Co.* and other California Supreme Court cases, a very strict test is applied, even where legislative intent is clear, in assessing whether any purported absolute disposition of tidelands is valid under trust principles: (1) there must exist a highly beneficial program in furtherance of trust purposes; (2) the lands to be freed of the trust must be merely a "residual portion" of the lands involved in the plan; (3) the lands must constitute a "relatively small parcel"; (4) the lands must have been rendered physically useless for trust purposes; and (5) the power of succeeding legislatures to administer the public trust over tidelands must not be impaired. (See, e.g., *People v. California Fish Co., supra,* 166 Cal. at pp. 585, 593-594; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40 [48 P.2d 20]; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 484-486 [91 Cal.Rptr. 23, 476 P.2d 423].)

C. Knudson v. Kearney

Prior to the decision below, both the courts and commentators have had a difficult time in harmonizing the above principles with the decision cited by Santa Fe, *Knudson v. Kearney* (1915) 171 Cal. 250. (See, e.g., *County*

of Orange v. Heim (1973) 30 Cal.App.3d 694, 712, fn. 15 [106 Cal.Rptr. 825]; Comment, *The Tideland Trust: Economic Currents in a Traditional Legal Doctrine* (1974) 21 UCLA L.Rev. 826, 844-845, fn. 90, 846, fn. 93; Comment, *California's Tideland Trust: Shoring It Up* (1971) 22 Hastings L.J. 759, 767; Comment, *San Francisco Bay: Regional Regulation For Its Protection and Development* (1967) 55 Cal.L.Rev. 728, 775-777.)

Knudson v. Kearney concerned a tideland sales program whereby, under statutes enacted in 1868 and 1870, some 22,299 acres of tide and submerged land in San Francisco Bay was auctioned off to private parties by an entity known as the Board of Tide Land Commissioners. The sales here in issue were made under the 1870 act. (Cal. Stats. 1869-70, ch. 388, p. 541.) In the act and in the subdivision maps prepared by the Board, there were passing references to "commerce and navigation". In isolated areas, "canals" were delineated on the Board maps. But in most areas, the Bay was subdivided into contiguous lots, no streets or canals were surveyed and reserved from sale, and no areas were set aside for docks, piers, or slips. Neither the act nor the Board maps made any provision for the actual construction of improvements in aid of either navigation or various other trust uses.

The State was not a party to *Knudson v. Kearney*, and the court could have affirmed the lower court judgment there without resort to a consideration of whether deeds issued by the Board of Tide Land Commissioners passed absolute fee title. (See California Court of Appeal decision below (147 Cal.Rptr. 113, 122).) The court nonetheless

stated that title to the deeded tide and submerged lands had passed to private parties in fee simple, free of any retained interests in the public.

D. The Decision of the California Supreme Court

The California Supreme Court in the case below determined that the tide and submerged lands deeded by the Board of Tide Land Commissioners under the 1870 act had passed private title, subject, however, to the same public trust easement that the court had found impliedly reserved by the tideland patents at issue in *People v. California Fish Co., supra,* 166 Cal. 576. The court so held on four independent grounds: First, it examined the 1870 act and its legislative history and determined that the clear and unambiguous legislative intent to terminate the trust required by *People v. California Fish Co.* was not present. (26 Cal.3d at pp. 525-531.) Second, it held that even if the Legislature had intended to terminate the trust, any such intent could not be given effect under trust principles because the conveyance of such a "vast area" of tidelands free of the trust would amount to "an improper abdication by the state of its role as trustee on behalf of the people." (26 Cal.3d at p. 531.) *Illinois Central Railroad v. Illinois* (1892) 142 U.S. 387, was cited with approval on this point. Third, the court ruled that *Knudson v. Kearney, supra,* could not legitimately have held that a "program for harbor development" contained in the 1870 act had legitimately terminated the trust, where, even 40 years after the grants, when *Knudson* was decided, the greatest proportion of the lands sold had not been developed in furtherance of the supposed program. To do so would be to perpetually impair the power of succeeding legislatures to

administer the trust for the public good, in the name of a purported program that had never been realized. (26 Cal.3d at pp. 531-532.) *Illinois Central* was also cited with approval on this point. Finally, the court concluded that *Knudson* was also wrong because "a number of cases had held or stated long prior to *Knudson* that a grant of tidelands, even if made for the improvement of navigation, does not vest absolute title in a private party until the improvements are actually made. (See, e.g., *People v. Williams* (1884) 64 Cal. 498, 499 [2 P. 393]; *People v. Kerber, supra,* 152 Cal. at pp. 736-737; *California Fish, supra,* 166 Cal. at pp. 599-600 [further citations omitted].)" (26 Cal.3d at p. 532.)

The question remaining for the court was whether to give its decision concerning the effect of the Board deeds full retroactive effect. The court noted that it had, in *People v. California Fish Co., supra,* given retroactive effect to a similar determination involving some 80,000 acres of tideland. It nevertheless chose to balance the competing public and private interests, deciding not to apply its holding retroactively as to filled lands that are substantially valueless for trust purposes. (26 Cal.3d at p. 534.) The court reasoned that tidelands that had neither been filled nor improved were the most suitable for continued exercise by the public of trust uses, whereas the loss to any private claimants who may have put misplaced reliance on *Knudson v. Kearney* was "speculative at best", given the strict regulatory controls over development of such tidal areas already exercised by state and federal authorities. There was no discussion concerning whether property was being taken without just compensation. The

court concluded by ordering the superior court to vacate its order "and to proceed in accordance with the views expressed herein."

SUMMARY OF ARGUMENT

On any one of a number of grounds, the petition should be denied.

There is no jurisdiction in this Court because the federal questions framed by Santa Fe were not timely raised below in accordance with state court rules of procedure. Because they were not timely raised, they were not decided below. Accordingly, this court lacks jurisdiction under 28 United States Code section 1257 to consider them.

Concerning the purported federal question involving a supposed mandatory application of federal common law by the California Supreme Court (allegedly evidenced by its citation with approval of *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387), there are several independent and adequate state grounds for the decision below, apart from the basis for decision that involves mention of *Illinois Central.* Under settled principles concerning this Court's lack of jurisdiction to render advisory opinions, this is an additional reason why there is no jurisdiction to consider this question. In addition, Santa Fe improperly invokes this Court's jurisdiction concerning this question because it does not fit within any of the categories of cases set forth in 28 United States Code section 1257(3), pertaining to this Court's jurisdiction to review state court cases on certiorari.

Neither is this case ripe for decision. By order of the state supreme court, the case must go back to the trial court for trial of various issues, such as whether there is an estoppel against assertion of the trust easement by the City and State, whether the property has been impliedly dedicated by virtue of public user, and whether the property has been inversely condemned by the City. Depending upon how these issues are disposed of, the federal questions that Santa Fe asks this Court to decide now could be mooted. This Court's discretion in such circumstances will be best exercised by a denial of the petition.

Concerning the substance of the supposed federal common law question raised by Santa Fe, an examination of this and past cases of the California Supreme Court readily demonstrates that *Illinois Central* has frequently been cited with approval in the course of the California Supreme Court's development of tidelands trust law. Neither in this instance, nor in any of the prior instances where that case has been cited, however, has the California Supreme Court done so under any supposed compulsion of federal common law principles. No question concerning the existence or application of "federal common law" was decided below.

Finally, the California Supreme Court has not taken Santa Fe's property in violation of the Fourteenth Amendment by rendering the decision below. The court merely confirmed, consistent with long-standing principles of California tidelands trust law, that the tideland deeds here in issue conferred a private title that was subject to a retained public trust easement in the public. The case relied

on by Santa Fe, *Knudson v. Kearney* (1915) 171 Cal. 250, was an isolated anomaly in the case law and was therefore rejected by the supreme court as inconsistent with the principles set forth in numerous other cases. In so doing, the court did not violate the Fourteenth Amendment.

In fact, the court was extremely solicitous concerning any reliance that may nonetheless have been placed upon *Knudson*, and limited its holding to unfllled lands that are still subject to the ebb and flow of the tides, thereby leaving unaffected by its decision the owners of tidelands that have been filled and improved. Thus, no investment-backed expectations were impaired such as would give rise to a taking under this Court's cases, even assuming that property can be "taken" by state court decisions that construe deeds.

Neither is Santa Fe justified in broadly claiming that the utility of its property has been "destroyed". Now, as it was prior to the decision below, Santa Fe is free to seek development permits for its tidelands from the appropriate state and federal regulatory agencies. Santa Fe does not allege that it has done so. Accordingly, its claim that its property has been taken by this decision is totally without any practical basis in fact.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Santa Fe Did Not Timely Raise Below Either of the Questions Presented in the Petition

This Court lacks jurisdiction to consider a federal question under 28 United States Code section 1257 unless that question was raised and decided below. (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 438.) In considering whether a

federal question was properly raised in a state court, state rules concerning the timeliness of issue presentation are determinative; and if state rules prohibit consideration of an issue because it was not timely raised, this Court may not consider the issue. (See *Beck v. Washington* (1962) 369 U.S. 541, 550-553; *Stembridge v. Georgia* (1952) 343 U.S. 541, 547 (where question was not timely raised under state practice because broached for the first time in a petition for rehearing in the intermediate state appellate court, no jurisdiction).)

Neither federal question presented by Santa Fe here was timely raised below.

The question concerning the existence of binding federal common law governing state administration of the tidelands trust was never raised by Santa Fe at any point, even in its petition for rehearing in the supreme court.[1] As set forth below, in citing *Illinois Central Railroad v. Illinois, supra,* with approval, the court was merely referring to principles which long ago were incorporated into California's tidelands trust law. There was absolutely no indication that the California court viewed *Illinois Central* as articulating principles of federal common law that were binding upon it.

Concerning the alleged violation of the Fourteenth Amendment by the State appellate courts in refusing to adhere to the language in *Knudson v. Kearney, supra,* that question was not timely raised when set forth for the

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[1]In its petition for rehearing, Santa Fe made passing references to *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, but only to argue that it should be distinguished. (Pet. for Reh., pp. 15, 22.)

first time in the petition for rehearing before the state court of appeal. (See *People ex rel. Dept. of Public Works v. Mascotti* (1962) 206 Cal.App.2d 772, 779-780 [23 Cal. Rptr. 846] ("It is the settled rule of this court that points made for the first time on petition for rehearing will not be considered."). Neither will the state supreme court on a petition for hearing review a question that was raised for the first time in a petition for rehearing in the court of appeal. (*Flores v. Stone* (1913) 21 Cal.App. 105, 111 [131 Pac. 348] (statement by state supreme court on denial of petition for hearing after decision by the court of appeal).) From the commencement of the writ proceeding, the disposition to be made of the supreme court's opinion in *Knudson v. Kearney, supra,* was a critical issue. The City and the State argued in their brief in supoprt of their petition for a writ of mandamus that *Knudson v. Kearney* should be rejected as precedent. (Pet. for Writ of Mandamus with Supporting Memo. of Pts. & Auths., pp. 5, 17-18, 25, 77-80.) Santa Fe's Fourteenth Amendment issue was not timely raised on petition for rehearing after the court of appeal had rendered its decision. The issue was properly disregarded by the supreme court.

II. This Court Lacks Jurisdiction to Consider the Federal Common Law Question for the Additional Reasons That There Are Adequate Non-Federal Grounds for the Decision Below and That the Question Does Not Involve a Right Claimed Under the Constitution, Treaties or Statutes of the United States

As set forth in the statement of the case above, there were three other independent bases for the state supreme court's decision, in addition to the ground for decision

that is quoted at page 11 of the petition. Even conceding for purposes of argument that this latter basis for the decision involved a federal question, a determination of that question by this Court would have no effect on the decision below. For instance, the first and principal ground for the supreme court's decision was its determination that the 1870 California Legislature had not intended to terminate the tidelands trust over the lands authorized to be sold. That led to the conclusion that the trust had not been terminated, a conclusion based solely on the strong language in *People v. California Fish Co., supra,* 166 Cal. 576, 597, that a legislative intent to terminate the trust "will not be implied if any other inference is reasonably possible," and that "if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation."

This Court has no jurisdiction to render advisory opinions, and if, by virtue of the existence of adequate nonfederal grounds for the state court decision, the same judgment would still issue from the state court after this court disposed of the federal question, there is no basis for the assumption of jurisdiction under 28 United States Code section 1257. (*Herb v. Pitcairn* (1945) 324 U.S. 117, 125-126.)

Further, the purported federal common law question does not come within any of the various grounds set forth in subdivision (3) of section 1257 for the review of state court judgments on certiorari. The question presented by Santa Fe does not involve the calling into question of the

validity of a treaty or statute of the United States; it does not involve the validity of a state statute drawn in question as being repugnant to the Constitution, treaties or laws of the United States; and it does not involve "any title, right, privilege or immunity . . . specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." According to Santa Fe, all the supreme court did was mistakenly consider itself bound as a matter of federal common law to follow *Illinois Central Railroad v. Illinois, supra,* concerning disposition of state trust lands lying beneath navigable waters. Even if true, that would not give rise to a federal question within the certiorari jurisdiction set forth in section 1257(3).

III. The Questions Presented Should Not Be Considered by This Court at This Time Because They May Be Mooted by the Further Proceedings That Are Necessary in the Trial Court on Remand From the State Supreme Court

The issue of the nature of the private title inhering in the tidelands deeded by the Board of Tide Land Commissioners was only one of several issues presented for decision in the case that is still pending in the superior court of Alameda County. Disposition below of these remaining issues could moot any federal questions. In the superior court action below, for instance, Santa Fe alleges that the City and State are estopped to assert any trust title in the subject property by virtue of certain alleged conduct upon which Santa Fe or its predecessors relied to their detriment. (Santa Fe complaint, pp. 4-6; Santa Fe answer to State's cross-complaint, p. 5.) Such alleged conduct has yet to be the subject of an evidentiary

trial and was not the subject of the writ action in the appellate courts. The City and State are strenuously resisting Santa Fe's estoppel claim, but should Santa Fe prevail on the trial of the estoppel issue, the questions decided in the writ proceeding will be mooted because Santa Fe will have established that it has fee title to the subject property, independent of the determination below that title originally passed in the 1870's subject to the public trust easement. Further, the City and State have alleged below that the property claimed by Santa Fe has been impliedly dedicated for certain purposes by virtue of public user. (See State's cross-complaint, pp. 5-6; *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 [84 Cal.Rptr. 162, 465 P.2d 50].) There is also the primary issue of inverse condemnation to be resolved.

There is no point in this Court rendering a decision now in this case which could be deprived of any practical effect by subsequent proceedings in the trial court. If, in the future, a case is presented where such federal questions are presented in a context that forecloses any possibility of such questions being mooted by further state court proceedings, that will be time enough for this Court to consider them. This is a case where it is "desirable to wait and see," and where it is therefore appropriate to refuse a grant of certiorari. (See *Darr v. Burford* (1950) 339 U.S. 200, 227 (Frankfurter, J., dissenting).)[2]

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[2]The Court may also wish to consider whether the decision below is truly "final" for purposes of exercising jurisdiction under 28 United States Code section 1257. It is the general rule that a decision, to be regarded as final, must be final as to all the causes of action involved and must not be merely an interlocutory or intermediate step in the litigation. (*Market Street R. Co. v.*

IV. There Is No Basis for Santa Fe's Assertion That the California Supreme Court Decided a Federal Question Merely by Citing a United States Supreme Court Case With Approval

From the simple fact that the supreme court cited *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, with approval, Santa Fe fabricates a phantom holding by the court that it was bound, as a matter of federal common law, to rule as it did concerning whether San Francisco Bay tide and submerged lands could be sold to private parties free of the public trust eastment for commerce, navigation, and fishery. There is absolutely no language in the court's opinion—anywhere—that indicates it made any such determination. Neither at the points in the opinion where *Illinois Central* is cited, nor at any other point does the court use the terms "federal common law", or "bound", or "binding", or any variant of these terms.

The court was simply doing what it has done many times in the past: citing *Illinois Central* with approval on an

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Comm'n (1945) 324 U.S. 548, 551; *Collins v. Miller* (1920) 252 U.S. 364, 370.) None of the exceptions to this rule set forth in *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 477-485, are applicable here. Admittedly there are some cases of this Court which arguably treat writ proceedings such as that below as separate actions that are to be tested for finality independent of the pendency of the unresolved primary actions out of which they arise. (But see *Grays Harbor Co. v. Coats-Fordney Co.* (1917) 243 U.S. 251, 255-256.) But given the fact that the writ of mandamus in California performs a function similar to that of an interlocutory appeal in other states, it may be appropriate to treat such writ proceedings, when used in this fashion, as not yet final, just as decisions on interlocutory appeals are regarded as not being final. (See *Whitus v. Georgia* (1967) 385 U.S. 545 (disposition of interlocutory appeal not regarded as final order).)

issue of public trust law, in recognition of that case's conceded status as the "lodestar" case in American law concerning its articulation of principles relating to public rights in navigable waters. (See Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention* (1970) 68 Mich.L.Rev. 471, 489.) *Illinois Central* consumes ten columns in Shepard's Citations. Many of the citations to it are contained in the decisions of state courts throughout the country. This only represents the common disposition of courts to follow as persuasive, but not as binding law, the decisions of courts from other jurisdictions, particularly when the decisions are those of this Court or of other federal or state courts of national reputation.

Illinois Central was early accepted by the California Supreme Court as an articulate statement concerning public trust rights in navigable waters and therefore woven into California law on the subject. (See, e.g., *Bolsa Land Co. v. Burdick* (1907) 151 Cal. 254, 262 [90 Pac. 532]; *Forestier v. Johnson* (1912) 164 Cal. 24, 30 [127 Pac. 156] ("Similar statements concerning this subject have been made by this Court," citing, inter alia, *Eldridge v. Cowell, supra,* 4 Cal. 80); *People v. California Fish Co., supra,* 166 Cal. 576, 584, 585; *Boone v. Kingsbury* (1928) 206 Cal. 148, 196 [273 Pac. 797].) By simply continuing, in this case, its recognition of *Illinois Central* as persuasive authority, the California Supreme Court did not thereby apply that case as binding federal law.

V. The Decision of the California Supreme Court, in Confirming That Tideland Deeds Conveyed a Private Title Subject to Retained Public Rights, and in Limiting Its Holding to Lands That Are Still Water-Covered, Did Not Take Private Property in Violation of the Fourteenth Amendment

As set forth above, the law was anything but clear concerning the nature of the title that passed to private parties by virtue of the deeds to tide and submerged lands issued by the Board of Tide Land Commissioners. The conflicts in the cases, the confusion of the commentators, the facts that the State was not a party to *Knudson v. Kearney, supra,* and that *Knudson* need not have reached the public trust issue; all served to vitiate any supposed reliance on *Knudson* as a definitive statement on the nature of title conferred by the Board deeds. Further, the contemporaneous opinion of the California Attorney General at the time of the 1870 act's passage was that title would go out subject to retained public rights. (See 26 Cal.3d at pp. 529-531.) Further, the provisions of article XV, section 2 of the California Constitution (now article X, section 4) made quite clear that claimants of tidelands held those lands subject to overriding rights in the public. Even a title report obtained on the very property here in issue contained an exception for the public trust rights that Santa Fe says were imposed for the first time in the decision below. (See City and State's Replication to Answer to Pet. for Writ of Mandamus, pp. 8-10.) Against this background, it cannot be said that *Knudson* had acquired "rule of property" status.

Further, in construing the effect of a deed, a court does not take property in violation of the Fourteenth Amendment when it disapproves ill-considered language on the issue from an earlier decision. Cases may be overruled and dicta disapproved without violating the due process or contracts clauses of the United States Constitution. (*In re L.A. County Pioneer Society* (1953) 40 Cal.2d 852, 865 [257 P.2d 1].) The two holdings cited by Santa Fe, those in *Muhlker v. Harlem Railroad Co.* (1905) 197 U.S. 544, and *Appleby v. City of New York* (1926) 271 U.S. 365, both related to impairment of the obligations of contracts by state statutes, in violation of Article 1, Section 10 of the United States Constitution; the cases did not relate to alleged deprivation of due process by state courts in violation of the Fifth and Fourteenth Amendments.

Despite the above considerations, and despite the fact that there clearly could have been no private reliance upon *Knudson v. Kearney* prior to that decision's rendition in 1915, the supreme court nonetheless dealt with the question of possible reliance upon *Knudson* in its decision. In applying its construction of the Board deeds, the court chose not to apply its decision to lands that had been filled and improved, and where significant investments may therefore have been made in reliance on the disapproved case. Instead, it ruled that the tidelands trust easement still applied only to those lands that were still covered by the waters of San Francisco Bay over 100 years after the deeds issued. Under settled California law, such lands were already, prior to the decision below, subject to a navigational easement in the public. (See, e.g., *Bohn v. Albertson* (1951) 107 Cal.App.2d 738 [238 P.2d 128].) In short, the

court's decision did not impair reasonable investment-backed expectations. The court characterized any economic detriment as "speculative at best". (26 Cal.3d at p. 535.) This same type of analysis has been used by this Court where a taking issue is truly presented under the Fourteenth Amendment. (See *Kaiser Aetna v. United States* (1979) 444 U.S. 164, ... [100 S.Ct. 383, 390].)

Further, Santa Fe's broad assertion that the decision has "destroyed the utility" of the deeded property that lies beneath Bay waters is advocates' hyperbole; it is not fact. Placement of improvements in the Bay is regulated by both the San Francisco Bay Conservation & Development Commission (BCDC) and the Corps of Engineers. Both the McAteer-Petris Act creating BCDC and BCDC's San Francisco Bay Plan allow for private development in the Bay, as long as the proposed development is consistent with the special value and utility of tide and submerged lands. (See Cal. Gov. Code, § 66600, et seq.) Similarly, the Corps of Engineers has and will permit appropriate private projects in Bay waters. Santa Fe does not allege that it has made application to either of these bodies for permission to develop its property. Santa Fe's assertion of a taking is therefore groundless; at best, it is premature. (See *Agins v. City of Tiburon* (1980) ..... U.S. ....., ... [100 S.Ct. 2138, 2141, 2142] (no taking where zoning ordinance valid on its face and landowners had not submitted a development plan to the City).)

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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